

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

ORIGINAL

74-2072

To be argued by
STANLEY BUCHSBAUM

(41693)

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-2072

JAMES RHEM, ROBERT FREELY, LEO ROBINSON and EUGENE NIXON,
individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

—against—

BENJAMIN J. MALCOLM, Commissioner of Correction for the City of New York;
ARTHUR RUBIN, Warden, Manhattan House of Detention for Men; ABRAHAM
D. BEAME, Mayor, City of New York,

Defendants-Appellants,

PETER PREISER, Commissioner of Correction of the State of New York; MALCOLM
WILSON, Governor, State of New York; and OWEN MCGIVERN, Presiding
Justice, New York State Supreme Court, Appellate Division, First Depart-
ment, individually and in their official capacities,

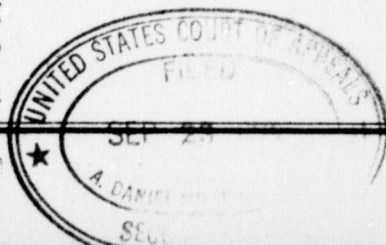
Defendants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

(1)

For the main part the Appellees' Brief, despite its
length, fails to come to grips with the specific issues we

have raised. In an attempt to create a sympathetic atmosphere, it deals with conditions which have changed and with matters which are not involved on this appeal.

In this Reply Brief, we shall confine ourselves to short responses to some of the arguments made by the appellees. However, before doing so, we wish to point out that the principle of judicial restraint enunciated in *Sostre v. McGinnes*, 442 F. 2d 178, 191-192 (2d Cir., 1971), cert. den. *sub nom. Sostre v. Oswald*, 404 U.S. 1049 (1972), 405 U.S. 978 (1972), with relation to a prisoner, would appear equally applicable to the present case. See also *Wright v. McMann*, 460 F. 2d 126 (2d Cir., 1972); *Holt v. Sarver*, 442 F. 2d 304, 307 (8th Cir., 1971).

(2)

Appellees, in describing the conditions at the Tombs which existed at trial, often fail to note the various changes that have since been implemented. These changes have been extensive and are not limited to the following list which has been supplied by the Department of Correction.

Lock-out time at the Tombs is 9½ hours (at various intervals between 5:30 A.M. and 10 P.M.), during which time the detainees are served their meals. During this lock-out period, they are permitted to partake in the programmed activities which we have outlined in our main brief at pages 15 to 16.

The visiting procedures have similarly been changed to permit greater flexibility. Visits may occur five days per week during the hours of 1 to 3 P.M., and 5 to 8 P.M. Visits are now for 45 minute periods. Although no more than two visitors are permitted during any one period, children are also allowed to visit at any time during the visiting periods (Appendix, 222a).

The frosted glass windows have not been replaced for one reason—the prohibitive cost of such a project. The Department of Public Works has reported that the replacement of these windows, including the removal of the frosted glass, installation of the new glass, as well as detention screens, would cost approximately 5½ million dollars (see Appendix, p. 240a).

The Department has informed this office that when the roof is ready for use by the inmates, they will have 2 hours each day for programmatic activity, including recreation, seven days per week.

(3)

The Appellees' Brief deals with the testimony concerning the possibility of classification so as to avoid the need for maximum security for many of the detainees (pp. 10-16). An examination of the testimony upon which it relies indicates how little reliability it has in connection with the Tombs. Much of it appears to proceed on the assumption that methods used for prisoners, after conviction, can appropriately be used for detainees. Apparently little consideration was given to the danger of violating Fifth Amendment rights which might occur in the course of interviews for classification purposes. Also, a good deal of reliance was had on procedures used in jails which are not located in a large city. See, for example, the testimony of Donald Goff at page 391a of the Appendix.

As pointed out in our main brief, the city retained an expert to prepare a classification system, and it turned out that the system he devised was seriously deficient (Main Brief, pp. 31-32).

At page 30 of the Appellees' Brief, it is suggested that adequate security for contact visits could be established

by constructing two or three security gates between the Tombs' visiting area and the street. We have been informed however, that this could not be done without a substantial reconstruction of that portion of the Tombs, and that other areas would have to be reconstructed in order to provide for contact visits.

At page 41 reference is made to the lack of heat in the winter until midday. This testimony would appear to refer only to isolated occasions (see Appendix 278a-279a).

(4)

At pages 71-72 of the Appellees' Brief a number of cases are cited, apparently to support the view that relief may be granted by a court without regard to the budgetary consequences. Obviously, one cannot excuse a violation of constitutional rights by simply arguing that it will cost money to remedy such violations. However, the courts do consider budgetary consequence and generally fashion the relief in light of it.

None of the cases relied on by the appellees, with a single exception which we shall advert to later, involved any expenditures which even closely resemble those that would be involved in the structural changes which were, in effect, sought by the District Court in this case.

In *Jones v. Wittenberg*, 330 F. Supp. 707 (1971), *affd. sub nom. Jones v. Metzger*, 456 F. 2d 854 (6th Cir., 1972), changes in physical facilities were quite limited. They are listed at pages 718 and 721 of the District Court opinion in that case. For example, they required the providing of "Ample and adequate rooms" for conducting physical examinations of inmates and entering prisoners and for treatment of medical emergencies and minor injuries and ill-

nesses, for repairs for heating and plumbing equipment, and for keeping the jail painted.

In *Taylor v. Sterrett*, 344 F. Supp. 411 (N.D. Tex., 1972), the limited changes required can be found at pages 422-423 of that opinion.

Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972), so far as it dealt with physical changes, required the following: a new prison hospital-infirmery; an indoor recreation area in the prison after the prison hospital was completed; repairs of plumbing; removal of metal covers and boarding on the outside of windows and the replacement or repair of window frames, as well as clear glass placed in broken windows; replacement of the communication system by a modern special telephone system and the installation of a public address system; the installation of a fire alarm system; and the modification of the night lighting system so as to provide adequate night lights less intrusive in the sleeping areas. The conditions of the jail in that case are described in our main brief, at page 26, in our discussion of *Hamilton v. Schiro*.

Hamilton v. Love is dealt with at page 25 of our main brief. The quotation from that case in Appellees' Brief must be read in light of what was involved.

Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark., 1970), involved an order requiring that the practice of using trustee guards with power over inmates be stopped, and some other analogous matters.

Brenneman v. Madigan, 344 F. Supp. 128 (N.D. Calif., 1972) is discussed at pages 24-25 of our main brief. The Court there pointed out that "it attempts to strike a balance between legitimate demands of pre-trial detainees for the unfettered enjoyment of those rights which they should

possess as persons unconvicted of any crime and the compelling custodial necessities of jail administration" (343 F. Supp. at p. 140).

The only case in which a court ordered substantial and extensive alterations that we were aware of is *Inmates of Suffolk County Jail v. Eisenstadt*. That case is described at pages 21-23 of our main brief. There, the court ordered the construction of a new jail. However, the conditions in the existing 125-year-old jail were so horrible that it cannot be compared with the Tombs.

(5)

At pages 89 et seq. of the Appellees' Brief, argument is made with regard to the wide discretion accorded to district courts in the framing of remedies. The cases cited by the appellees appear to be the strongest cases available in support of leaving the relief granted by a district court unchanged on review. None of those cases, however, bar a Court of Appeals from modifying the relief granted by a district court. They all involve situations different from those involved at bar.

It should also be recalled that the determination under review in *Hart v. Community School Board of Brooklyn*, 497 F. 2d 1027 (2d Cir., 1974), had an interesting and relevant history. There, Judge Weinstein had originally directed a plan for extremely extensive relief. By the time he came to entering the judgment, he had decided that it was appropriate to grant much more limited relief. At pages 40-41 of our main brief we quote from his opinion handed down at the time the judgment was entered. [Apparently this second opinion has not yet been officially reported.]

CONCLUSION

The order appealed from should be reversed and the District Court directed to take no action to remedy the conditions on which it was based. In the alternative, the order should be reversed and the District Court directed to provide a more appropriate remedy.

September 20, 1974.

Respectfully submitted,

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AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

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leaving the same with him.

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John Calia

Bruce Garner

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LOUIS J. HOFFMANN
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